In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-815

SAMUEL C. EVANS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

Petitioner asserts that, because he relied upon an erroneous opinion of counsel that he had complied with the securities laws, he could not later be enjoined from future violations.

1. This litigation concerns the activities of petitioner Samuel Evans who, after Rolling International, Inc.—a publicly-held company that he controlled and of which he was president—was adjudicated bankrupt,[1] regrouped his assets and, through a holding company and a series of mergers,[2] obtained control of another public

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[1]Rolling International, Inc., was adjudicated bankrupt on April 29, 1970 (Tr. 201, Px. Ex. 33). References to the portions of the transcript that were in the Appendix in the court of appeals are referred to as "Tr." The Commission's exhibits are referred to as "Px. Ex." IMC International, Inc.'s exhibits are referred to as "IMC Ex." Petitioner's exhibits are referred to as "Evans Ex."

[2]Tr. 200-203, 210-214, 231-236, 269, 316-317, 510; Px. Exs. 3, 23, 39, p. 3; IMC Ex. 2; Evans Ex. 15.

company, IMC International, Inc. ("IMC"). In order to conceal his control he did not become an officer or director of this company (Tr. 250-252, 476-477). These positions were largely filled by petitioner's former assistants[3] but, as a "consultant," petitioner received payment for his services substantially in excess of the salary of any of its officers or employees.[4]

Petitioner had the consulting contract placed in the name of a corporation in which his wife (in her maiden name) owned all the shares (Px. Ex. 10, p. 9), and back-dated the contract with this corporation to some four months before it was incorporated (Px. Exs. 5, 27). In addition, the majority holdings of a company owning a substantial number of shares of IMC were held in petitioner's wife's maiden name. Petitioner used his own name in connection with IMC only in the purchase of 82,000 shares of its stock.

This was the background against which petitioner failed to make Commission filings which would have disclosed his connections with IMC. Although certain of petitioner's connections ultimately were disclosed in late filings by IMC itself, and by his wife's holding company, most of these disclosures occurred after petitioner had sold the IMC stock held in his name, making a profit of about $95,400 on the 82,000 shares in which he had

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[3]Two of the chief officers of International Music Corporation were men petitioner had brought with him from Rolling International after the bankruptcy (Tr. 193, 218-219). Petitioner also selected the president of International Music Corporation (Tr. 243). These persons became officers and directors of Humanics, Inc., which, by change of name, became IMC (Tr. 191-192, 233-234, 493).

[4]As a "consultant" petitioner was paid $50,000 per year (Tr. 227-230, 240-242, 245).

a cash investment of $3,560 (Evans Ex. 10; Px. Exs. 35, 36, 37). Petitioner sold the 82,000 shares of stock on March 23, 1971 (Px. Ex. 36), but the district court concluded that petitioner continued to exercise control over IMC until August 31, 1972, when he also sold the shares held in his wife's name. Several months later IMC, in turn, was declared bankrupt (App. 148).[5]

2. The Commission sought to enjoin petitioner from failing to file reports which would have disclosed his control of corporations with which he was associated. Evidence introduced by the Commission detailed petitioner's involvement with and control of IMC, which we have discussed above. The district court granted the requested injunction (App. 147-154), and the court of appeals affirmed on the basis of the district court's opinion.

Petitioner's arguments in the court of appeals centered about whether he had purchased his 82,000 shares of IMC stock on September 23, 1970, when they concededly constituted more than 10 percent of the IMC stock outstanding, or on September 29, 1970, when the issuance of new IMC stock in connection with a merger reduced them to a lesser percentage.[6] The district court, in accord with what petitioner previously had stated in a letter (Px. Ex. 34), concluded that he had purchased the

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[5]"App." refers to the appendix in the court of appeals.

[6]At the time of this transaction Sections 13(d)(1) and 16(a) of the Securities Exchange Act, 15 U.S.C. 78m(d)(1) and 78p(a), required that certain forms be filed with the Commission for the public record by all persons having direct or indirect beneficial ownership of more than 10 percent of the shares outstanding of any company registered with the Commission pursuant to Section 12 of the Securities Exchange Act, 15 U.S.C. 78*l*. IMC was so registered. As of December 22, 1970, the percentage of equity securities necessary to require the filing of a report pursuant to Section 13 was reduced to 5 percent. 84 Stat. 1497.

stock on September 23, 1970, and, accordingly, that he was required by that purchase to file reports with the Commission under Sections 13(d)(1) and 16(a) of the Securities Exchange Act. The district court also found that, in any event, reports had to be filed with respect to petitioner's beneficial ownership as of September 29, 1970, because his wife's holding company owned 29 percent of IMC's stock as a result of the merger that occurred on that date.

3. The petition suggests that petitioner's failure to file reports was based on the advice of counsel, Mr. Chantilis, whom the petition characterizes (Pet. 3) as petitioner's "general counsel."[7] Mr. Chantilis did not discuss with petitioner, however, the need to file any forms regarding the purchase of the 82,000 shares of stock, nor had he been consulted about the acquisition. Neither he nor Mr. Spinuzzi, whom the petition characterizes (Pet. 3) as a "securities specialist," knew about petitioner's purchase until after the fact.[8]

These two attorneys did discuss the question of petitioner's control of IMC (Tr. 366). This discussion, however, was limited to the question whether petitioner "controlled" his wife's stock in the holding company. Neither of the attorneys met petitioner's wife or questioned her concerning

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[7]At trial, when asked if he represented Mr. Evans, Mr. Chantilis replied that he "d[id] some work from time to time for Sam" (Tr. 324).

[8]Mr. Chantilis had learned about the acquisition on the afternoon of September 29, 1970 (Tr. 319-322), but he testified that he had limited knowledge of securities matters and found it necessary to rely on Mr. Spinuzzi for advice (Tr. 337). John Spinuzzi did not become aware of the purchase until March 1971, during a conversation with Mr. Chantilis (Tr. 355-356, 389). Accordingly, the petition (pp. 3-4) appears to misread Mr. Chantilis' testimony as to a conversation with Mr. Spinuzzi (Tr. 337), which apparently dealt with the question of whether Mr. Evans should file any forms because of his interest in the corporation through the holdings in his wife's name rather than through the purchase of the 82,000 shares.

the conduct of her business affairs or her business relationship with petitioner.[9] Mr. Spinuzzi had assumed that petitioner was a "control person" because of his wife's holdings (Tr. 440), but since petitioner was adamant in denying his control position (Tr. 383), Mr. Spinuzzi testified that he "end[ed] up with a compromising position" because

> [t]here was sufficient argument on [petitioner's] part that we could not be convinced absolutely as counsel to say you must file, you are definitely a control person. [Tr. 388.]

4. Whatever justification there may have been for Mr. Spinuzzi's "compromising position" on the facts then known to him, there is no merit to petitioner's position that he should not have been enjoined because he acted on counsel's advice. The petition (Pet. 6) concedes that for such a defense there must be "full, frank disclosure by the client * * *." Here Mr. Spinuzzi knew only what petitioner wanted him to know; he was not aware of the 82,000 shares of stock in petitioner's own name, of petitioner's consulting arrangement with the company (Tr. 378), or of other factors indicating petitioner's control of IMC.[10]

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[9]Mr. Chantilis testified that he had never talked with Mrs. Evans (Tr. 313-314), and Mr. Spinuzzi stated that he did not meet her until July 1971 (Tr. 405).

[10]For example, he was not aware that immediately after the merger the offices into which IMC had moved were leased from petitioner, or that for some time thereafter more than one-half of the stock of the company into which IMC had merged was indirectly held by petitioner's wife (Tr. 366-368).

Petitioner seeks to have this Court consider the extent to which a person may rely in good faith upon the advice of counsel regarding technical Commission requirements not concerning a violation of the "spirit of the law" (Pet. 2, 5). Because petitioner did not advise his counsel of the facts upon which he sought an opinion, the question is not properly presented in this case.

In any event, the violations were serious and contravened the spirit as well as the letter of the law.[11] As the trial court concluded:

> The failure of timely disclosure by IMC and the non-disclosure by [petitioner] constituted willful violations in that they were designed to present information in the light most favorable to the company while omitting any information of a detrimental nature about the background of the company or its control persons and management. This concealment deprived the investing public of facts that were material in the sense that a reasonable investor would have considered them important in making an investment decision. * * * The evidence in this case indicates that IMC and [petitioner] will, unless enjoined, continue to engage in the acts and practices set forth in the Complaint. [App. 151-152.]

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[11]Although the petition states ((Pet. 4) without citation) that "Mr. Spinuzzi verified that [petitioner] had a great deal of respect for the Securites Laws, and definitely wanted all reports to be filed when required," Mr. Spinuzzi's testimony was as follows (Tr. 411, emphasis supplied):

> Mr. Evans had a great deal of respect for the Securities laws and if we had ever told him *absolutely* that we had to do something *we might have a little argument over it*, but I think he would have done it.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1975.